

June 24, 2002

By facsimile & U.S. mail

Commissioner Marc Spitzer
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

Re: Qwest's June 18, 2002 Letter to Commissioner Marc Spitzer;
AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letter to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. We also received a copy of the June 18, 2002 response to your letter by Qwest Corporation ("Qwest's Letter"). Although Qwest entered into unfiled agreements with several Competitive Local Exchange Carriers ("CLECs"),¹ Qwest discusses the Eschelon agreements specifically in its letter, indicating that it is using these agreements as an illustration. While Eschelon could agree to some of the statements in Qwest's Letter, Eschelon has a different perspective as to the events. Eschelon believes that, now that Qwest has submitted its letter, Eschelon should state its position for the Commission.

Qwest's conduct with respect to Eschelon, McLeod, Covad, or the other small CLECs with which Qwest had agreements needs to be reviewed in context. In the fall of 2000, Qwest's then Chairman and Chief Executive Officer, Joseph Nacchio, publicly announced an agreement with McLeod, which he characterized as a significant positive development. He stood before the Regional Oversight Committee ("ROC") and told members that Qwest was going to go behind closed doors and work out differences with CLECs, rather than litigate them. Representatives of Qwest repeatedly said they wanted to work on a "business-to-business" basis with Eschelon, rather than litigate issues. They also continually attempted to distinguish Qwest from the former company, US West.²

¹See Staff Report and Recommendation, *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, AZ Docket No. RT-00000F-02-0271 (June 2, 2002); see also Amended Verified Complaint, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (March 19, 2002). The "small CLECs" identified in the Minnesota Complaint include the following 10 CLECs: HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, Onvoy Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, VAL-ED Joint Venture, and WETEC. See *id.* ¶ 196.

²See also "After Joseph P. Nacchio, Qwest Communications International Inc.'s brash, Brooklyn-born chief executive, won the battle for U S West in 1999, he wasted no time deriding the sleepy regional Bell.

Qwest asked for time to make the transition to become a more CLEC-friendly wholesale business. Qwest made these types of statements to others as well.³ As the Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) (“Escalation Letter”) shows, Eschelon’s management wanted to believe in the promise of a better relationship under new management and attempted to use the non-litigious path touted by Qwest.⁴

Some members of Eschelon’s management have worked for incumbent local exchange carriers (“ILECs”) themselves. They have also been through changes in ownership and management and know that the related transitions can take time. Eschelon’s management was open to working with Qwest and, if it really worked, to saying so publicly and perhaps even at some point supporting Qwest’s 271 bid.⁵ Although it could be inferred from Qwest’s Letter that it worked, it didn’t work.

Despite the suggestion in Qwest’s Letter to the contrary, the 271 provision in the Escalation Letter was a condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. Qwest would not agree to develop a plan to address pressing service quality and other problems unless Eschelon dropped its opposition to Qwest’s 271 bid. Whereas Qwest’s Letter reads as though all service problems were solved *before* Eschelon dropped out of the 271 proceedings, Qwest required Eschelon to *first* drop out of the proceedings. Eschelon thus takes issue with the following statement in Qwest’s Letter: “Eschelon’s agreement to not oppose Qwest’s Section 271 application was . . . expressly contingent upon the parties’ ability to agree upon *and implement* a plan that satisfied Eschelon.” Qwest’s Letter, p. 2 (emphasis in original). The Escalation Letter included only an *agreement to agree* to a plan to implement service quality solutions. It did *not* condition Eschelon’s agreement to not oppose Qwest’s Section 271 application upon the parties’ ability to *implement* a plan,

In senior management meetings, he described the company as ‘U S Worst’ and publicly likened the company’s workers to ‘clowns.’ He surrounded himself with colleagues from his high-flying upstart, and cut U S West executives out of the loop. When Qwest moved into U S West’s dated-looking headquarters here, Mr. Nacchio installed a sign on the 52nd floor that read: ‘Excuse our appearance. We’re entrepreneurs. This building was built in a different era and we save cash by not remodeling.’” Solomon, Deborah, “Bad Connection: How Qwest’s Merger With a Baby Bell Left Both in Trouble --- Brash Mr. Nacchio Derided U S West After Buying It; Now, It’s His Safety Net --- SEC Probes the Accounting,” *The Wall Street Journal* (via Dow Jones), p. A1 (April 2002).

³ See, e.g., *id.*

⁴ Generally, public policy favors settling disputes. See, e.g., Minn. Stat. § 237.011 (“Telecommunications goals”; “encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.”). In the 271 dockets, Eschelon refrained from litigation while attempting to resolve disputes, including quality of service problems. Eschelon’s conduct was legitimate behavior, particularly because Eschelon was not obligated to participate in the 271 proceedings. It is a separate question as to whether any other rule or policy required Qwest to disclose the known problems raised by Eschelon in discovery, pursuant to the burden of proof, or otherwise in the 271 proceedings.

⁵ In fact, when Eschelon experienced improvement in Qwest’s performance, Eschelon acknowledged that improvement, even in some cases when the performance still had a ways to go. Eschelon’s management hoped that positive reinforcement would encourage progress, and Qwest made it known that it was more willing to negotiate if CLECs made such statements.

as represented in Qwest's Letter. Although Qwest's Letter cites the April 30, 2001, deadline for agreeing to an implementation plan, that deadline was extended more than once. An implementation plan was not agreed upon until July of 2001. The July agreements had to be implemented after that date. From November 15, 2000 through July of 2001 (and afterward), however, Qwest required that Eschelon not participate in 271 proceedings as a condition of continuing negotiations as to the plan and implementation of the plan and later agreements.

Nonetheless, the premise of Qwest's Letter, with respect to Eschelon, appears to be that Eschelon did not participate in 271 proceedings because Eschelon's problems were solved. Qwest's Letter particularly creates this impression for a reader unfamiliar with the underlying facts. But, this is not the case. The problems were not all solved. Qwest points to Eschelon's letter of November 3, 2000, to the Commission to suggest that, if any⁶ problems continued to exist, Eschelon would have continued to raise them in the 271 proceeding. As Qwest knows, however, the later November 15, 2000, Escalation Letter required Eschelon's silence.⁷ Despite Eschelon's arguments to the contrary, Qwest interpreted that agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the 271/SGAT proceedings.⁸

⁶ The November 3, 2000, letter related primarily to cutover issues. Most of the problems raised by Eschelon in the Arizona 271 proceeding related to UNE-P. See Eschelon's Comments Addressing UNE Combinations, *In re. U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000) ("Arizona UNE-P Comments"); see also Verification of Garth Morrisette (same).

⁷ Qwest states that none of the five merger-related agreements in issue contained agreements to refrain from participation in 271 proceedings. See Qwest's Letter, p. 1. Qwest also states that only two agreements of those referred to by Commissioner Spitzer mentioned 271 proceedings. *Id.* If they do not imply that there were no other agreements relating to 271 participation, these statements at least leave the issue unanswered for the Commissioner. According to a news report, McLeod had an agreement not to oppose Qwest in 271 proceedings, but it was an oral agreement. See "States Probe Qwest's Secret Deals To Expand Long-Distance Service," *Wall Street Journal*, p. A10 (April 20, 2002) ("As part of that deal, McLeod agreed to stop its opposition to the Qwest-U S West merger. The company also had a verbal agreement to not oppose Qwest's entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.") Qwest does not state whether there were any others.

⁸ Qwest particularly objected to Eschelon raising publicly any problems with commercial performance. Eschelon argued that it could participate in SGAT proceedings to gain input into the wording of the SGAT without submitting evidence of problems with commercial performance. Eschelon believed that an opportunity to influence the language of the SGAT would have been important and valuable, because Eschelon has a different business plan from other CLECs involved in that process and could have tried to ensure that its issues were addressed. Qwest also uses the SGAT as a negotiation template, and participation in the SGAT proceedings would have allowed Eschelon to gain a better understanding of that template. But, Qwest took the opposite position and claimed that Eschelon's participation would breach the Escalation Letter. In fact, on the one occasion when Eschelon's representative later attended a multi-state 271/SGAT workshop in Denver, Qwest's attorney Charles Steese told her that she should not be there. Qwest's representatives also called Eschelon's top management to complain and made Eschelon "explain" its conduct. Afterward, Eschelon no longer participated in the 271 proceedings, as required by Qwest.

Because Qwest required confidentiality and did not disclose the Escalation Letter,⁹ Qwest was able to create the impression that problems with Qwest's commercial performance were solved when all of them were not. Qwest bears the ultimate burden of proof as to its commercial performance on all checklist items, however, even if "no party files comments challenging compliance with a particular requirement." FCC BANY Order, ¶ 47.¹⁰

Eschelon entered into the plan and related agreements with the expectation that, if an agreement were reached as to service quality issues, Qwest would abide by the agreement. Although Qwest represents in Qwest's Letter that the 271 provision was . . . contingent upon the parties' ability to agree upon and implement a plan "*that satisfied Eschelon*,"¹¹ Qwest still has not implemented a plan to address Eschelon's quality issues to Eschelon's satisfaction. *See, e.g.*, Affidavit of Lynne Powers (June 7, 2002) (copy enclosed).¹² Eschelon had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona 271 proceeding. Qwest was aware of these problems, through many discussions with Eschelon, as well as through monthly Report Cards provided by Eschelon to Qwest during that time. Eschelon could not raise these issues to the ACC, however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in 271 proceedings.¹³ Therefore, the following statement in Qwest's Letter is also inaccurate: "if it did not [work], Eschelon was free to say so, to the ACC or to anyone else." Although Eschelon was dissatisfied in several respects, pursuant to the November

⁹ Regarding Qwest's obligation to file agreements, Eschelon agrees with the following quotation by Anthony Mendoza, the Minnesota Department of Commerce deputy commissioner for telecommunications: "[Qwest] is the only company that is required to disclose them to the PUC." *See* "Companies didn't clear deals with PUC, regulators say," Steve Alexander, Minneapolis *Star Tribune*, Feb 15, 2002, p. D2. The federal Act places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act. Placement of the burden on Qwest makes sense, because Qwest has superior access to information relevant to whether a term or condition is of the type for which filing is required. (For example, while a CLEC may believe that a term is in settlement of an individual dispute, Qwest is in a position to know whether the dispute is truly unique or the experience is shared by other CLECs and whether the same or similar solution is suitable for, and should be made available to, other CLECs.) Eschelon is not aware of anything in the agreements that prevented Qwest from filing them. Qwest could have requested written consent for disclosure from CLECs at any time, if Qwest claims it was concerned about the confidentiality provisions that Qwest required as part of agreements.

¹⁰ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ["FCC BANY Order"].

¹¹ *See* Qwest's Letter, p. 2 (emphasis added).

¹² Not only were Eschelon's substantive issues not fully addressed, but also Qwest did not even adhere to the terms of the Escalation Letter itself. The letter identified Qwest's then CEO Mr. Nacchio by name and required Mr. Nacchio to meet with Eschelon, but Mr. Nacchio refused to do so.

¹³ For example, the enclosed email, dated May 25, 2001, from Eschelon to Andrew Crain, Charles Steese, and Jim Gallegos of Qwest confirms that Eschelon was not responding to Qwest discovery in the Arizona 271 proceeding, because Eschelon was "not participating in the [Arizona 271] proceeding at Qwest's request."

15, 2000, Escalation Letter, Eschelon was not “free to say so, to the ACC or to anyone else.”

In Qwest’s Letter, Qwest also points out that Eschelon participated in the Change Management Process (“CMP”) (including Re-design) while the 271 proceeding was pending. The CMP is separate from the 271 proceedings, and issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. Any issues that were did not have the benefit of explanation by Eschelon, which had first-hand experience with the problems. Eschelon would have participated more fully in CMP, if Qwest had not exerted pressure on Eschelon not to do so. Eschelon argued that CMP was not a 271 proceeding and therefore the Escalation Letter did not prohibit participation in CMP.¹⁴ Qwest took the opposite position and actively enforced it. Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon’s participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon’s President personally attended CMP monthly and Re-Design meetings to determine whether Qwest’s attacks on Eschelon representatives were fair and whether Qwest’s representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon’s President concluded that Qwest’s statements were not fair or accurate and the Eschelon’s CMP participation was appropriate and necessary to resolve critical business issues. Eschelon’s President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon’s perspective. Mr. Martin did not do so. Although Eschelon ultimately maintained some level of participation in CMP, it is difficult and frustrating, in light of the actual events, to read that Qwest is now holding out Eschelon’s participation in CMP as evidence of alleged full and uninhibited participation in CMP.

Qwest also states in its letter that: “The purpose of the settlements was not to suppress complaints but rather to *resolve* them.” Qwest’s Letter, p. 1 (emphasis in original). However, in addition to Qwest’s position with respect to CMP and 271/SGAT meetings, on October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to “deliver to Qwest all reports, work papers, or other documents related to the audit process” relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would “when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively).” Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved

¹⁴ In this general time frame, Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. When doing so, Qwest was well aware of market conditions and the resulting additional pressure that would be placed on Eschelon from stopping the payments and knew that doing so gave Qwest greater leverage over Eschelon. Eschelon does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped.

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without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals. Because Qwest has made representations regarding its purpose in proposing settlements, the Commission should have these facts when making that determination.

The telecommunications market is experiencing critical challenges. As a start-up, smaller company, Eschelon is particularly affected by these challenges. Resources are tight, and Eschelon's energy needs to be devoted to meeting the business challenges that it faces daily. Eschelon is also aware that it has settled some of its own claims with Qwest and that it may be viewed as late in speaking out. In light of all of this, Eschelon hesitated to send this letter. Because of Qwest's specific discussion of its dealings with Eschelon in Qwest's Letter, however, Eschelon decided it should share its different perspective.

Sincerely,

J. Jeffery Oxley

Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell
Commissioner Jim Irvin
Timothy Berg, Qwest
Todd L. Lundy, Qwest
Richard Corbetta, Qwest
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